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SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 1952

NO.....

THE STILLEY PLYWOOD COMPANY, INC.
Petitioner

VS.

THE NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, The Stilley Plywood Company, Inc., respectfully prays certiorari to review a decision of the United States Court of Appeals for the Fourth Circuit affirming, in part, an Order of The National Labor Relations Board (hereinafter called the Board) issued by said Board against The Stilley Plywood Company, Inc., on the 31st day of May 1951, and enforcing the Order of the Board, as affirmed.

Summary Statement of the Matter Involved

This case involves a proceeding brought by the Board against this Petitioner under Section 10 of

the National Labor Relations Act, as amended (61 Stat. 136, 29 USC., Supp. IV, Sect. 151 et seq., hereinafter called the Act) in connection with certain alleged unfair labor practices at this Petitioner's plant at Conway, South Carolina.

Following hearings before a Trial Examiner of the Board, an Intermediate Report and Recommended Order was issued by the Trial Examiner on the 22nd day of August, 1950, in which this Petitioner was directed to cease and desist from unfair labor practices, to bargain in good faith with a labor union which had been chosen as bargaining representative by its employees and to reinstate with back pay certain employees found to have been discriminatorily discharged or denied reinstatement following an alleged unfair labor practice strike (BA 20-141).[1]

In due time this Petitioner filed exceptions to the Intermediate Report and Recommended Order of the Trial Examiner (BA 144-178). Thereafter, the Board, upon review of the matter issued its Decision and Order on May 31, 1951 (94 NLRB 932) affirming, in part, the Intermediate Report and Recommended Order of the Trial Examiner. (BA 179-196).

Thereafter, the cause came on to be heard before the United States Court of Appeals for the Fourth Circuit upon a petition by the Board for the enforcement of its Order issued against The Stilley Plywood

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[1] By stipulation and for the purpose of the within petition, the printed record consists, in part, of the Appendix to Board's Brief in the United States Court of Appeals and the Appendix to Stilley Plywood Brief in the United States Court of Appeals. References herein to the Appendix to Board's Brief in the United States Court of Appeals are designated "BA" and references to Appendix to Stilley Plywood Brief in the United States Court of Appeals are designated "RA."

Company, Inc. On October 13, 1952, said Circuit Court of Appeals issued its Decree affirming, in the main, the Board's Order and enforcing the Board's Order as affirmed. (Case No. 6411 in the United States Court of Appeals for the Fourth Circuit).

One of the principal issues in the cause involved the contractual arrangement for logging entered into in May of 1948, in the State of South Carolina, between this Petitioner and a former employee of Petitioner, named Graham Holt. (Both Petitioner and Holt are residents of South Carolina.) Prior to April of 1945, Petitioner (which manufactured plywood and lumber from logs) acquired its supply of logs through the means of logging contractors. This was its historic method of getting logs (RA 331-332). In April of 1945, Petitioner undertook logging operations itself for the first time in its history (RA 331-332). At that time, Graham Holt was a foreman for one of the logging Contractors. When Petitioner undertook the logging, Holt, along with former logging contractors, was put on Petitioner's payroll (RA 141-142, 147-148). In 1946 and 1947, before advent of the Union at Petitioner's plant, Petitioner again started contracting its logging to logging contractors and trucking contractors (RA 153, 170-171, 333). In May of 1948 (after the Union had been certified and about the time bargaining negotiations commenced), Petitioner contracted with Graham Holt to have the latter take over the remaining *part* of Petitioner's logging (RA 153, 174, BA 512). Petitioner contends that its contract with Holt was bona fide and that its contract and arrangement with Holt established the latter as an independent contractor. The Trial Examiner concluded that Petitioner's transfer of logging operations to Holt was pretensive and was motivated

by a desire to undermine the Union (to rid itself of Union adherents) and that the contract with Holt did not establish him as an independent contractor (BA 88-91). The Board, with scarcely any comment, affirmed the Trial Examiner with reference to the contractual arrangement between the Petitioner and Holt. Moreover, the Board held that this arrangement constituted a *per se* violation of Section 8 (a) (5) of the Act. (BA 181-182).

The United States Court of Appeals affirmed the findings and order of the Board, except as to the discriminatory discharge of employee, Jethro Rabon. (The Rabon issue is not presently involved). Although the matter of contracting of logging was one of the principal issues in the cause, and although this issue was strenuously argued before the Court, both in the printed Briefs and oral argument, the Court made no reference whatever to this matter in its opinion and decision. Moreover, the United States Court of Appeals made no reference whatever to the decision of the Supreme Court of the State of South Carolina in the case of *McDowell v. Stilley Plywood Company*, 41 S. E. (2nd) 872, in which case the Court of last resort in South Carolina decided that an arrangement similar to the one now under consideration created the relationship of independent contractor. This decision of the Supreme Court of South Carolina was specifically called to the attention of the United States Court of Appeals.

The Evidence

Probably an extended discussion of the evidence would be unwelcome, at least at this stage of the pro-

ceedings. We shall, therefore, treat it as briefly as possible for the purposes of the within Petition.

Prior to May of 1948, Petitioner had contracted with others for part of its logging (RA 170-171, 333, 153). (These were not questioned by the Board). In May of 1948, Petitioner entered into the following contract or arrangement with Graham Holt: Holt was to log for Respondent; Holt was to furnish his log truck and small equipment (such as saws, axes, tools, etc.); Petitioner was to furnish the heavy equipment (such as tractors, loaders and skidders); Petitioner was to furnish the parts for skidders and Holt was to furnish the labor for repairing the skidders (the contract was changed in January 1, 1949, so as to require Holt to maintain all heavy equipment); Holt was paid upon a sliding scale basis at a rate from $15.00 to $25.00 per thousand feet, log measure, including cutting, decking and hauling, the exact price varying from time to time, depending upon logging conditions and the distances of hauling; Holt was to cut timber owned by Petitioner and was given the privilege of buying timber himself and selling it to Respondent. (RA 174, 175, 333, 335; BA 510-512, 532). The agreement between Holt and Petitioner was admittedly a parol one and had no specified period of duration.

At the time Holt commenced logging in May of 1948, he purchased one log truck and one labor truck and two chain saws from the Petitioner. These items were purchased on credit and secured by Chattel Mortgages (RA 175, 332-334). At the same time, Holt took over most of Respondent's logging employees at the same rate of pay. In order to obtain a lower insurance rate the trucks were registered in Petitioner's name so as to be insured under its fleet policy. (Holt paid for this insurance. (RA 334; BA 541). On the

other hand, Holt purchased one chain saw from Dillon Supply Company; he purchased his own small equipment (such as axes, saws and tools); sometime after May of 1948, he purchased other vehicles (not from Petitioner); he purchased, on his own, gasoline, oils and grease and fuels from various sources; he subcontracted parts of the log hauling. (RA 176; BA 519, 516, 513, 514, 515, 510, 526). Holt filed his own unemployment compensation records as an employer and contractor with the South Carolina Employment Security Commission, the North Carolina Employment Security Commission and the Collector of Internal Revenue (under the Federal Contributions Act). (RA 308-309). According to these records, Holt's employees varied in number from time to time and their rates of pay varied. Petitioner had nothing to do with the hiring, laying off and discharging of such employees, nor with their rates of pay; neither did Petitioner direct Holt's employees. (RA 175, 176, 334; BA 510-511, 514, 515, 528, 530).

After May 1948, Holt purchased some timber on his own and sold it to Petitioner at market price. (BA 524; RA 175). He filed his own social security records and paid for preparation of these records. (BA 520). Holt carried his own compensation insurance (BA 519-520). He arranged for his employees to purchase merchandise on credit (BA 517; RA 38). He had repairs to his equipment made at a local garage and paid for the same (BA 516).

Petitioner exercised no control over Holt's operations, except to indicate the tracts of timber to be cut and the sizes and species of timber to be logged (supra).

Petitioner's contract arrangement with Holt was

virtually the same as all other logging contracts which Petitioner had previously made in the period of its entire history (RA 159, 330-335; BA 529). And one of these previous logging contracts which Petitioner had made was passed upon in 1947 by the Supreme Court of South Carolina, in the case of *McDowell v. Stilley Plywood Company, supra.*

Jurisdiction

The Judgment of the United States Court of Appeals was entered October 13, 1952. Jurisdiction of this Court is invoked under Title 28, sec. 1254, United States Code.

Question Presented

The question presented is whether the contract for logging entered into in May of 1948 between the Petitioner and Graham Holt created the relationship of independent contractor and established Holt as an independent contractor.

Reasons Relied Upon for Allowance of Writ

The United States Court of Appeals has decided this matter of local importance in a way which conflicts with applicable local decisions and has based its decision on a misconception of the applicable South Carolina law.

Prayer

Petitioner prays that a proper Writ of Certiorari be issued, directed to the United States Court of Appeals for the Fourth Circuit, that this matter may

be reviewed and reversed, and that such other relief be granted as may be proper.

Respectfully submitted.

JOHN H. LUMPKIN
Barringer Building
Columbia, South Carolina

ARTHUR M. WILLIAMS, JR.
1309 Hampton Street
Columbia, South Carolina

JOHN B. MCCUTCHEON
Chestnut Building
Conway, South Carolina
Attorneys for Petitioner

SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 1952

NO.....

THE STILLEY PLYWOOD COMPANY, INC.
Petitioner

vs.

THE NATIONAL LABOR RELATIONS BOARD

BRIEF IN SUPPORT OF PETITION

Jurisdiction

The Jurisdiction of this Court is invoked under Title 28, sec. 1254, United States Code.

Statement of the Case

This is an unfair labor practice case brought by the National Labor Relations Board (hereinafter called Board) against this Petitioner under Section 10 of the National Labor Relations Act, as amended (61 Stat. 136, 29 USC., Supp. IV, Sect. 151 et seq., hereinafter called the Act).

Following the usual proceedings, the Board issued its Decision and Order on May 31, 1951 (94 NLRB 832) in which this Petitioner was directed to cease

and desist from unfair labor practices, to bargain in good faith with the Union and to reinstate, with back pay, certain employees found to have been discriminatorily discharged or denied reinstatement following an alleged unfair labor practice strike (BA 179-196).[1]

On October 8th, 1952, the cause was heard before the United States Court of Appeals for the Fourth Circuit upon a Petition by the Board for the enforcement of its Order issued against this Petitioner. That Court issued its decree affirming, in the main, the Board's order and enforcing the Board's order as affirmed (Case No. 6411 in the United States Court of Appeals for the Fourth Circuit).

One of the principal issues (if not the most important) in this cause involved a contractual arrangement for logging entered into in May of 1948 between this Petitioner and a former employee of Petitioner by the name of Graham Holt. This Petitioner's contention throughout this entire case has been that its contract and arrangement with Graham Holt created the relationship of independent contractor and established Holt as an independent contractor. We have hitherto in the annexed Petition stated, in some detail, the matters pertaining to this issue and in the interest of brevity we will not repeat them at this point.

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[1] By stipulation and for the purpose of the within petition, the printed record consists, in part, of the Appendix to Board's Brief in the United States Court of Appeals and the Appendix to Stilley Plywood Brief in the United States Court of Appeals. References herein to the Appendix to Board's Brief in the United States Court of Appeals are designated "BA" and references to Appendix to Stilley Plywood Brief in the United States Court of Appeals are designated "RA."

Specification of Errors

The United States Court of Appeals for the Fourth Circuit erred in holding that the contract and arrangement entered into in the State of South Carolina, in May of 1948, between Petitioner and Graham Holt, both of whom were residents of said State, for logging to be performed in said State, did not create the relationship of independent contractor and did not establish Holt as an independent contractor; the error being that under the South Carolina law the relationship of independent contractor was created and Holt was an independent contractor.

Argument

This contract for logging entered into between the Petitioner and Graham Holt, in May of 1948, was a South Carolina Contract or Agreement. Both parties to the agreement were residents of said State and the principal place of business of Petitioner was located in South Carolina. Moreover, the agreement was for labor to be performed in the State of South Carolina. And at the time of the hearing in this matter the contract was being performed in the said State.

This matter is, therefore, governed by the law of the State of South Carolina, and in our opinion the United States Court of Appeals has failed to apply the South Carolina law. In fact, the Court below made no reference whatever, in its decision, to this matter of the contracting of the logging and made no reference whatever to the South Carolina law. The lower Court, in affirming the Decision and Order of the Board which disallowed the independent contractorship and which held the agreement to be a *per se*

violation of Section 8 (a) (5) of the Act, has decided an important question of local law in a way which conflicts with applicable local decisions.

In the case of *McDowell, et al v. Stilley Plywood Company, et al*, 41 SE (2d) 872, the Supreme Court of the State of South Carolina had under consideration the construction of a logging contract (nearly identical to the one now in issue) and the question as to whether the relationship of independent contractor existed between Stilley Plywood Company and one Wilbert K. McDowell. While that case involved a proceeding under the Workmen's Compensation Act, it is nevertheless apposite insofar as this instant matter is concerned. It appears from the report of that case that McDowell cut, logged and hauled timber which was owned and furnished by Stilley Plywood Company, although occasionally he bought logs and sold them to Stilley Plywood Company; McDowell's compensation varied from time to time, depending on distances of haul and logging conditions, the exact contract price per thousand feet log measure being determined and agreed upon before logging each tract of land; Stilley Plywood Company designated the tracts upon which logging operations should be performed and designated the sizes and species of timber to be cut and had the privilege of requiring the logger to discontinue logging upon any given tract; McDowell had no written contract with Stilley Plywood Company; McDowell owned some of the equipment used in the logging operations and the other equipment was furnished to him by Stilley Plywood Company; Stilley Plywood Company also advanced money or credit to McDowell for repairs to his individual equipment and these advances were deducted from his earnings; McDowell hired and discharged

the employees working for him and paid these employees. The South Carolina Supreme Court decided that the Stilley Plywood Company did not exercise control or supervision over *the operations* conducted by McDowell, nor did it interfere with the *judgment* or *manner* in which McDowell carried on operations, nor did it have concern with the employment or discharge of workers used by McDowell; and the Court decided that McDowell was, therefore, an independent contractor. The South Carolina Court quoted, with approval, from the North Carolina case of *Hayes v. Board of Trustees of Elon College*, 224 NC 11, 29 SE (2d) 137, 139:

> "It appears from these authorities that the retention by the employer of the right to control and direct *the manner* in which *the details of the work* are to be executed and *what the laborers shall do* as the work progresses *is decisive*, and when this appears it is universally held that the relationship of master and servant or employer and employee is created.
>
> "Conversely, when one exercising an independent employment contracts to do a piece of work according to *his own judgment and methods*, and without being subject to his employer except as to the result of the work, and who has the right to *employ* and *direct the action* of the workmen, independently of such employer and freed from any superior authority in him to say *how* the specified work shall be done or *what laborers shall do* as it progresses, he is clearly an independent contractor.
>
> "The vital test is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee *as to details.*" (Italics supplied).

As we view the matter, there is little, if any, real difference in the contract and arrangement between

Petitioner and Holt in this instant cause and the contract and agreement between Stilley Plywood Company and Wilbert K. McDowell, which was passed upon by the South Carolina Court.

According to Graham Holt's undisputed testimony, he hires his own employees and he discharges and lays them off; and the Petitioner has nothing to do with this hiring, discharging and laying off of Holt's employees (BA 514, 528). According to the undisputed testimony of Petitioner's Superintendent of Logging, W. A. Nelson, this Petitioner has no control over Holt's employees and has nothing to do with the hiring of Holt's employees (RA 175, 185); and neither does Petitioner have anything to do with the rate of pay for Holt's employees, nor with Holt's working conditions (RA 176). According to the evidence of Petitioner's President, W. A. Stilley, Jr., the employees of Holt are not subject to the Petitioner's direction (RA 334). According to Holt's undisputed testimony, he pays his own employees (BA 517). According to Holt's undisputed testimony, he subcontracted parts of the logging operations to others (BA 510-511; RA 176). It is undisputed that Holt arranged for his employees to purchase merchandise on credit (BA 517; RA 38). While Holt, at the very outset of his operations, in May of 1948, took over some of Petitioner's logging employees at the same rates of pay (which was perfectly logical), the number and rates of pay of his employees subsequently varied and fluctuated. This is borne out by the employment records introduced in evidence by Holt at the request of the Trial Examiner (RA 308-309). Petitioner had nothing to do with these employment fluctuations.

It is apparent from this record that the Petitioner did not superintend, control or direct "the manner

in which the details" of Holt's work were executed, nor what Holt's laborers did as the work progressed. It is likewise apparent that Holt did "his piece work according to his own judgment and methods" (RA 175, 176, 334-335; BA 514-515, 534, 543). And these factors, in the language of the South Carolina Supreme Court, are "decisive."

On this issue of independent contractorship, the factor of Petitioner's ownership of most of the timber logged by Holt is not controlling. Neither is it controlling that Petitioner owned and supplied Holt with equipment used in the logging operations; nor is it controlling that Holt obtained financial assistance from Petitioner; nor is it controlling that petitioner designated the sizes and species of timber to be cut. Neither is it controlling that Holt's compensation varied from time to time and that the contract price was agreed upon as each tract of timber was logged. This is clearly supported by the decision of the South Carolina Supreme Court in the case of *McDowell, et al v. Stilley Plywod Company, et al., supra.*

In the case of *Chatman v. Johnny J. Jones Exposition, Inc.*, 47 SE (2d) 302, the Supreme Court of the State of South Carolina, in upholding a relationship of independent contractor, made the following statements:

> "The mere fact that one of the contracting parties is empowered to give general directions as to what is to be done without control over the *methods or means of doing it* does not necessarily have the effect of creating the relation of principal and agent or master and servant. 27 Am. Jur., pages 490 and 491; Annotation 20 A.L.R., beginnnig on page 697." (Italics supplied).

Under the South Carolina law, the contract and

arrangement between Petitioner and Graham Holt clearly created the relationship of independent contractor and established Holt as an independent contractor.

This matter of logging and the validity of logging contracts is one of special significance in this area of extensive lumber enterprises. It is an important question of local law which has been passed upon by the State Court of last resort.

If the United States Court of Appeals for the Fourth Circuit had followed the decision of the Supreme Court of the State of South Carolina, the Order of the Board would have been modified and reversed as to the existence of the status of independent contractor on the part of Graham Holt.

Conclusion

Wherefore, it is respectfully submitted that the writ of certiorari should issue, as prayed.

Respectfully submitted.

JOHN H. LUMPKIN
Barringer Building
Columbia, South Carolina

ARTHUR M. WILLIAMS, JR.
1309 Hampton Street
Columbia, South Carolina

JOHN B. MCCUTCHEON
Chestnut Building
Conway, South Carolina
Attorneys for Petitioner

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